Malayan Banking Bhd v Boau Yoon Fut @ Wong Yoon Fut (bankrupt represented by the Director General of Insolvency)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-03(IM)-70–05 OF 2014
MOHAMAD ARIFF, ZAWAWI SALLEH AND IDRUS HARUN JJCA
28 OCTOBER 2014

Land Law — Charge — Rights of chargee — Chargor adjudicated bankrupt — Bankrupt obtained loan secured by charge on land vested in Director General of Insolvency — Whether chargee notified of acquisition — Whether bank entitled to full compensation sum — Whether bank surrendered security by filing proof of debt — Whether chargee entitled to full compensation sum pursuant to provisions in charge annexure — Whether doctrine of estoppel applied

The appellant ('the bank') had provided a loan on the security of a third party charge over the land granted by the respondent, who was subsequently declared bankrupt. The bank then filed a proof of debt ('the POD') under the Bankruptcy Act 1967 ('the Act'). The land was subsequently vested in the Director General of Insolvency ('the DGI') following the making of the adjudication and receiving orders by the Bankruptcy Court. The bank wrote to the DGI and asked for the compensation sum be paid to the bank but this was rejected by the DGI as it was stipulated that the bank had surrendered its security and hence, the bank was entitled to merely a pari passu sum. However, the bank argued that it was entitled to the full sum of the compensation since it had not surrendered its security merely by filing the POD. The bank's application was dismissed by the senior assistant registrar. In dismissing the bank's appeal, the High Court relied on the operation of s 8(2A) of the Act, noting that the bank had realised their secured interest 'only after some nine years' from the date the respondent was adjudicated bankrupt. In the present appeal, the issue that arose was whether the bank could be assumed to have given up or surrendered its security on the facts and on the law.

Held, allowing the appeal:

(1) There had been no proper judicial appreciation of the facts and the application of s 8(2A). Section 8(2A) of the Act was irrelevant for the purposes of the application as the section merely referred to the bank's entitlement to claim further interest on top of the indebtedness as at the date of the receiving order. The section does not operate as a complete bar to any realisation of the security beyond the six months' period under the provision (see para 10).

(2) Having considered the provisions in Schedule C of the Act and the exact

terms of the POD filed as well as s 42 of the Act, there was little scope for any 'assumption' that the bank as secured creditor had elected to surrender its security just by filing a POD for the full sum of indebtedness without the election being unequivocal. The POD filed was ambiguous. It did not state expressly that the bank was surrendering the security. Nor did it state that the bank was attaching a value to the security, and hence proving in the bankruptcy for the shortfall (see paras 18–19).

(3) The DGI did not respond to the bank promptly although the POD had been filed with an ambiguity. The DGI only responded some two years later in terms recognising the bank as a secured creditor and sought the bank's confirmation whether it was willing to forego its shortfall if the full compensation was paid to it. In light of this, a finding that the bank had given up the security for the benefit of the general creditors would be obviously perverse (see paras 28–31).

(4) The bank was not aware of the land acquisition in order to have participated in the acquisition hearing. It was the obligation of the DGI as the chargor to inform the bank of the acquisition but the DGI had failed to do so. Hence, this is a suitable case for the application of the doctrine of estoppel against the DGI. The conduct of the bank had been so influenced by the DGI that it would be unconscionable for the DGI to insist on his strict rights under the bankruptcy law, even on the assumption that these rights are supportable on the law. All monies received as compensation should be applied towards the discharge or repayment of monies secured by the charge and that 'the chargor shall and hereby declares that it will hold such monies as received in trust for the bank'. Since the title to the land had been transferred to the DGI, in was incumbent on the DGI to respect the express contractual promise, unless the evidence was clear that the bank had surrendered its contractual rights. The facts did not demonstrate an unequivocal surrender of the security by the bank (see paras 28–31).

[Bahasa Malaysia summary

Perayu ('bank') telah memberikan pinjaman atas jaminan caj pihak ketiga ke atas tanah yang diberikan oleh responden, yang kemudiannya diisytiharkan bankrap. Bank kemudiannya memfailkan bukti hutang ('POD') di bawah Akta Kebankapan 1967 ('Akta'). Tanah kemudiannya diletakhakkan kepada Ketua Pengarah Insolvensi ('KPI') berikutan penghakiman dan perintah penerimaan oleh Mahkamah Kebankrapan. Bank menulis kepada KPI dan memohon untuk jumlah pampasan dibayar kepada bank tetapi ini telah ditolak oleh KPI kerana ia telah ditetapkan bahawa bank telah menyerahkan jaminannya dan maka, bank berhak hanya kepada jumlah pari passu. Walau bagaimanapun, bank berhujah bahawa ia adalah berhak kepada jumlah penuh pampasan memandangkan ia tidak menyerahkan jaminannya dengan hanya memfailkan POD. Permohonan bank ditolak oleh penolong kanan pendaftar.

Dalam menolak rayuan bank, Mahkamah Tinggi bergantung ke atas operasi s 8(2A) Akta, mengambil kira bahawa bank telah merealisasikan kepentingan yang dijamin mereka 'only after some nine years' dari tarikh responden dihakimkan bankrap. Dalam rayuan ini, isu yang berbangkit adalah sama ada bank boleh dianggap telah menyerahkan jaminannya atas fakta dan atas undang-undang.

Diputuskan, membenarkan rayuan:

(1) Tidak terdapat penilaian kehakiman yang betul terhadap fakta dan penggunaan s 8(2A). Seksyen 8(2A) Akta adalah tidak relevan bagi tujuan penggunaan kerana seksyen tersebut hanya merujuk kepada hak bank untuk menuntut faedah selanjutnya di atas keberhutangan pada tarikh perintah penerimaan. Seksyen tersebut tidak beroperasi sebagai halangan lengkap kepada apa-apa realisasi jaminan melampaui tempoh masa enam bulan di bawah peruntukan (lihat perenggan 10).

(2) Setelah mempertimbangkan peruntukan dalam Jadual C Akta dan syarat-syarat tepat POD yang difailkan dan juga s 42 Akta, terdapat skop yang sedikit untuk apa-apa 'assumption' bahawa bank sebagai pemiutang bercagar telah memilih untuk menyerahkan jaminannya hanya dengan memfailkan POD untuk jumlah penuh keberhutangan tanpa pemilihan sebagai berbelah bagi. POD yang difailkan adalah kabur. Ia tidak menyatakan dengan nyata bahawa bank menyerahkan jaminan tersebut. Ataupun tidak menyatakan bahawa bank meletakkan nilai kepada jaminan tersebut, dan maka membuktikan dalam kebankrapan bagi kekurangan (lihat perenggan 18–19).

(3) KPI tidak menjawab kepada bank dengan segera walaupun POD tersebut telah difailkan dengan kabur. KPI hanya menjawab lebih kurang dua tahun kemudian dari segi menerima bank sebagai pemiutang bercagar dan memohon pengesahan bank sama ada ia sanggup untuk melepaskan kekurangannya sekiranya pampasan penuh dibayar kepadanya. Berdasarkan ini, dapatan bahawa bank telah menyerahkan jaminan untuk faedah pemiutang am akan dengan jelasnya bertentangan (lihat perenggan 20–21 & 27).

(4) Bank tidak menyedari mengenai pengambilan tanah untuk menyertai dalam pendengaran pengambilan. Ia adalah tanggungjawab KPI sebagai penggadai untuk memberitahu bank mengenai pengambilan tetapi KPI telah gagal berbuat sedemikian. Maka, ini adalah kes yang sesuai untuk permohonan doktrin estopel terhadap KPI. Tindakan bank telah dipengaruhi oleh KPI bahawa ia adalah tidak berhati perut untuk KPI untuk mendesak atas hak ketatnya di bawah undang-undang kebankrapan, walaupun atas anggapan bahawa hak ini adalah diterima atas undang-undang. Kesemua wang yang diterima sebagai pampasan patut digunakan terhadap pelepasan atau bayaran balik wang yang

dijamin oleh caj dan 'the chargor shall and hereby declares that it will hold such monies as received in trust for the bank'. Memandangkan hak kepada tanah telah dipindahkan kepada KPI, adalah wajib ke atas KPI untuk menghormati janji kontraktual yang nyata tersebut, kecuali keterangan adalah jelas bahawa bank telah menyerahkan hak kontraktualnya. Fakta tidak menunjukkan penyerahan yang berbelah bagi jaminan oleh bank (lihat perenggan 28–31).]

Notes

For cases on rights of chargee, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2929–2932.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (folld)

Chung Khiaw Bank Ltd v The Government of the State of Sabah & Ors [1994] 2 MLJ 193, SC (refd)

Douglas Homes Qld Pty Ltd (in liq), Re (1978) 3 ACLR 715, SC (refd)

K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor [2005] 2 MLJ 201, FC (refd)

Malayan Banking Bhd v The Official Assignee (receivers of the estate of Velu Marimuthu (bankrupt) [1993] 2 AMR 3400, HC (refd)

Moor v Anglo-Italian Bank (1879) 10 Ch D 681, Ch D (folld)

Pilecon Realty Sdn Bhd v Public Bank & Ors and another appeal [2013] 3 MLJ 1, FC (refd)

Provident Capital Limited v Kelso Builders Supplies Pty Limited (in liquidation) (Receiver and Managers Appointed) (2008) 66 ACSR 643, FC (refd)

Surfers Paradise Investments Pty Ltd (in liq) v Davoren Nominees Pty Ltd [2003] QCA 458, SC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 8, 8(2A), 40, 42, Schedule C, paras 9, 10, 11, 26

National Land Code

Appeal from: Bankruptcy No 29–1028 of 2003 (High Court, Kuala Terengganu)

R Himahlini (G Meerashree with her) (Lee Hishamuddin Allen & Gledhill) for the appellant.

Rosli bin Ahmad (Director General of Insolvency, Malaysian Department of Insolvency (Terengganu Branch)) for the respondent.

Mohamad Ariff JCA:

[1] This appeal concerns a single issue of entitlement to a compensation sum arising from the compulsory acquisition of a piece of land which was subject to a charge under the National Land Code where the chargee was Malayan Banking Bhd, the appellant ('the bank'). The bank had provided a loan on the security of a third party charge over the said land granted by Boau Yoon Fut @ Wong Yoon Fut, the respondent. The respondent was subsequently declared a bankrupt, and the bank filed a proof of debt under the Bankruptcy Act 1967 ('the Act'). The land that was the subject of the third party charge was subsequenttly vested in the Director General of Insolvency following the making of the adjudication and receiving orders by the Bankruptcy Court.

[2] The facts of this appeal are peculiar, and counsel for the parties (the DGI representing the bankrupt) concede that there is as yet no direct case authority in point in Malaysia. The proof of debt ('the POD') filed by the bank is ambivalent on whether on its face the bank has surrendered its security or has merely proved for the balance outstanding after giving value or realising its security. The facts have required us to consider in some detail the provisions of s 42 and Schedule C of the Act.

[3] Can the bank in such circumstances be presumed to have surrendered its security and therefore entitled only to a pari passu shares in the assets of the bankrupt by way of dividends? On the precise facts, is the bank merely entitled to a pari passu share in the compensation sum or to the full sum?

It is the view of the DGI that the bank is entitled to merely a pari passu sum, since it has surrendered its security in the charged land.

[4] The bank, on the other hand, argues it is entitled to the full sum of the compensation since it has not surrendered its security merely by filing the POD. The bank further argues the DGI, by its previous conduct, should be estopped from maintaining that the Bank is not entitled to the full sum.

[5] The bank relies, among other authorities, on the Supreme Court decision in *Chung Khiaw Bank Ltd v The Government of the State of Sabah & Ors* [1994] 2 MLJ 193, where the court held it would be wrong in principle to apportion a compensation sum since 'a charge is indivisible and the security is attached to the whole property', and it follows that 'until the property is discharged, the interest (of the chargee) is on the whole property and any proceeds of the sale of the property will attach to the whole property'.

[6] We are of the view that this is the correct and accepted position in

relation to the status of any compensation sum where the property is a charged property over which the charged has not been discharged, unless of course the bank/chargee has elected under bankruptcy law to forego its security and claim for the total indebtedness against the estate and assets of the bankrupt.

[7] Procedurally, this appeal concerns the notice of application (encl 19A) filed by the bank under ss 40 and 42 of the Act and Schedule C, para 28 thereunder, for the following relief:

> i. Satu perintah bahawa keputusan Ketua Pengarah Insolvensi melalui Surat Maklum oleh Jabatan Insolvensi bertarikh 11 Disember 2011 dan 16 Julai 2013 yang menolak permohonan Malayan Banking Berhad untuk mendapatkan semula wang pampasan tanah berjumlah RM631,309.50 dan seterusnya menyatakan bahawa pembahagian wang pampasan tersebut adalah secara pari passu kepada semua pemiutang yang telah memfailkan bakti hutang diakas dan/atau ditukar atau diubah.
>
> ii. Suatu perintah bahawa kos permohonan ini dan kos yang timbul disebabkan permohonan ini ditanggung oleh Jabatan Insolvensi ...

[8] The senior assistant registrar who heard the application dismissed the appeal. The High Court judge also dismissed the bank's appeal from this decision.

[9] It is clear from the learned judge's grounds of judgment that the High Court judge relied on the operation of s 8(2A) of the Act to dismiss the appeal, noting that the bank had realised their secured interest 'only after some nine years' from the date the respondent was adjudicated a bankrupt. The learned judge referred to the recent Federal Court decision in *Pilecon Realty Sdn Bhd v Public Bank & Ors and another appeal* [2013] 3 MLJ 1.

[10] With respect, there is a glaring error here, since s 8(2A) is irrelevant for purposes of the application made. Section 8(2A) merely refers to the bank's entitlement to claim further interest (not an interest in the security sense) on top of the indebtedness as at the date of the receiving order. The section does not operate as a complete bar to any realisation of the security beyond the six months' period under the provision. It is evident that there has been no proper judicial appreciation of the facts and the application of s 8(2A).

[11] In the interest of certainty and proper understanding, we quote the relevant parts of s 8 of the Act:

> s 8 Effect of Receiving Order
>
> (1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor

A is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

B (2) *This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed* — nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of section 31 of the Employment Act 1955 ... or any C corresponding provisions in Sabah and Sarawak.

(2A) Notwithstanding subsection (2), no secured creditor shall be entitled to *any interest in respect of his debt* after the making of a receiving *order if he does not realize his security within 6 months from the date of the receiving order* ...

D (Emphasis added.)

[12] The issue of interest is completely irrelevant on the facts of the appeal. Indeed, the compensation sum (RM631,309.50) is even less that the E indebtedness to the bank (according to the POD filed, the indebtedness is RM1,122,794.97).

[13] The critical issue in this appeal is still the short issue whether the bank F can be assumed to have given up or surrendered its security on the facts and on the law.

[14] We have considered the provisions in Schedule C of the Act, and the exact terms of the POD filed which appears on pp 177–182 of the appeal G record, Vol 2. We have further considered the elucidation of paras 9–17 of Schedule C of the Act in *Malayan Banking Bhd v The Official Assignee (Receivers of the estate of Velu Marimuthu (Bankrupt)* [1993] 2 AMR 3400, as followed in *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201.

H **[15]** In summary, a secured creditor has three 'elections' under bankruptcy law:

(a) it can stand outside the bankruptcy, and realise its security (see para 9); or

I (b) it can value its security and prove for the difference between this value and the amount of its debt (see para 11); or

(c) it can surrender its security to the DGI for the general benefit of the creditors (see para 10).

[16] To quote these express provisions:

> 9. If a secured creditor realizes his security, he may prove for the balance due to him after deducting the net amount realized.
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> 10. If a secured creditor surrenders his security to the Director General of Insolvency for the general benefit of the creditors he may prove for his whole debt.
>
> 11. If a secured creditor does not either realize or surrender his security he shall state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after valuing the value so assessed.

[17] The court in *Malayan Banking Bhd v The Official Assignee (Receivers of the estate of Velu Marimuthu (Bankrupt)*, has laid down the general principles very clearly:

> The combined effect of .... s 42 of the Bankruptcy Act 1967, and Schedule C thereto is that there is no mandatory requirement for a secured creditor to come under the liquidation. He has the option of either relying entirely on his security for which he is not obliged to submit a proof of debt. If he however decides to come under the liquidation, he submits proof of his debt and will be entitled to a dividend in respect of the unsecured portion. If he does not submit proof of his debt, then pursuant to para 16 of Schedule C, he shall be excluded from participating in a dividend.

[18] Section 42 is equally express. It provides that the rules in Schedule C 'shall' be observed with respect 'to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs and other matters'. It seems to us that in this respect there is little scope for any 'assumption' that the bank as secured creditor has elected to surrender its security just by filing a POD for the full sum of indebtedness without the election being unequivocal.

[19] The POD filed is ambiguous. It does not state expressly that the bank is surrendering the security. Nor does it state that the bank is attaching a value to the security, and hence proving in the bankruptcy for the shortfall. Here is where the principle in the old common law case of *Moor v Anglo-Italian Bank* (1879) 10 Ch D 681, becomes very relevant. According to this authority, there is 'no rule in bankruptcy that a petitioning creditor who omits in his petition either to give an estimate of the value of his security or to state that he will be ready to give up his security for the benefit for the benefit of the creditors in the event of his debtor being adjudicated bankrupt, thereby forfeits the benefit of his security'.

[20] The facts of this appeal also establish that the DGI did not see it fit to respond to the bank promptly although the POD had been filed with an ambiguity. We agree with the bank's argument that the DGI is required under

para 26, Schedule C to reply stating whether he admitted or rejected the POD in writing:

> 26 The Director General of Insolvency shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

[21] The DGI did not formally respond in the manner laid down, but responded only some two years later in terms recognising the bank as a secured creditor and seeking the bank's confirmation whether it was willing to forego its shortfall if the full compensation sum was paid to it. The land administrator had earlier paid the compensation sum directly to the DGI.

[22] The POD was filed on 26 November 2008. The first response came on 11 October 2010.

[23] The bank then wrote to the DGI and asked that the compensation sum be paid to the bank. However, in a turn of events, the DGI then rejected the request. The ground raised for the rejection was that the bank had surrendered its security. This was made known to the bank on 11 December 2011, and again on 16 July 2013.

[24] We have considered the factual sequence carefully in order to place the positions taken by the DGI and the bank in proper context. The AO/RO was made on 8 December 2004. The charged property was vested in the DGI on 18 May 2005. Although the POD was filed on 26 November 2008, the bank had proceeded earlier to obtain an order for sale of the charged property that it obtained on 8 September 2008. The bank proceeded further to apply for summons for directions and to fix an auction date on 10 June 2009. The auction date was fixed for 1 September 2009, with a reserve price of RM631,310. It appears that the DGI's representative was present in court on the hearing of the summons for directions.

[25] It was at this stage that the compulsory acquisition intruded. The bank claims it came to know of the land acquisition only on 18 January 2010, when it did a land search.

[26] As we have seen earlier, on 11 October 2010 the DGI wrote to the bank seeking its confirmation on the payment of the compensation sum and inquiring whether the bank was willing to forego the 'shortfall'.

[27] In these circumstances, a finding that the bank had given up the security for the benefit of the general creditors will be obviously perverse.

[28] It is no answer to say that the bank should have participated in the acquisition hearing. It was not in the know, and by the charge the obligation was on the chargor (meaning in this context, the DGI) to inform the bank of any land acquisition. The DGI cannot now turn the tables in its favour, and seek to place the blame on the bank.

[29] Given the conduct of the DGI, this, to our mind, affords a suitable case to apply the doctrine of estoppel against the DGI under the principles laid down in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283. The conduct of the bank has been so influenced by the DGI that it will be unconscionable for the DGI to insist on his strict rights under bankruptcy law, even on the assumption that these rights are supportable on the law.

[30] In any event, the facts do not demonstrate an unequivocal surrender of the security by the bank. The court is entitled to look at the conduct of the bank and assess whether it has surrendered the security. The Australian cases cited by counsel for the bank (*Provident Capital Limited v Kelso Builders Supplies Pty Limited (in liquidation) (Receiver and Managers Appointed)* (2008) 66 ACSR 643; *Re Douglas Homes Qld Pty Ltd (in liq)* (1978) 3 ACLR 715; *Surfers Paradise Investments Pty Ltd (in liq) v Davoren Nominees Pty Ltd* [2003] QCA 458) are very helpful pointers on the principles to be employed although they deal with companies winding up).

[31] All said and done, the facts here concern a banking transaction where primacy has to be accorded to the documentary terms and conditions in the interest of certainty and predictability of commercial transactions. The provisions in the charge annexure are clear. Clause 12 governs 'Government Acquisition', and under cl 12.3(a), all monies received as compensation shall be applied towards the discharge or repayment of monies secured by the charge, and 'the chargor shall and hereby declares that it will hold such monies as received in trust for the bank'. With respect, since the title to the land has been transferred to the DGI, it is incumbent on the DGI to respect this express contractual promise, unless the evidence is clear that the bank has surrendered its contractual rights.

[32] For the reasons we have discussed above, we are of the opinion that there have been serious errors of law and a serious failure to appreciate the material facts to an extent that appellate intervention is warranted. We are therefore allowing this appeal and setting aside the orders of the High Court judge and the senior assistant registrar dated 30 April 2014 and 18 March 2014 respectively.

[33] We order further that the appellant's application in encl 19A (*notis*

A *permohonan* dated 21 November 2013) be allowed as prayed in paras (i) and (ii).

[34] We also set aside the orders on costs below and make no order as to costs for this appeal.

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[35] Deposit is refunded to the appellant.

Appeal allowed.

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Reported by Afiq Muhamad Noor

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